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No. 89-646

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JONATHAN W. DUNCAN, Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

AND THE UNITED STATES OF AMERICA, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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65 pp

QUESTIONS PRESENTED

1.

Whether affirmative misrepresentation by counsel on the immigration consequences of a criminal plea requires the invalidation of a plea where defendant had a colorable defense, based his decision to plead guilty principally on the incorrect advice of counsel, and where counsel could have provided accurate advice by reasonable efforts.

2.

Whether a conviction under 28 U.S.C. § 843(b) and 18 U.S.C. § 2 constitutes a crime related to a controlled substance.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Jonathan W. Duncan, and the respondents, the Immigration and Naturalization Service and the United States of America.

The respondents before this Court are the Immigration and Naturalization Service and the United States of America.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JONATHAN W. DUNCAN, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE

AND THE UNITED STATES OF AMERICA, Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioner, Jonathan W. Duncan, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the 11th Circuit, entered in the above-entitled proceeding on April 27, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the 11th Circuit has not been reported. It

is reprinted in the appendix hereto, p. 1a, infra.

The decision of the United States District Court for the Northern District of Georgia (Vining, D.J.) denying the § 2255 Motion has not been reported. The district court's findings of facts and conclusions of law have not been reported. It is reprinted in the appendix hereto, p. 1d, infra.

The decision of the Board of Immigration Appeals has not been reported. It is reprinted in the appendix hereto, p. 1n, infra.

JURISDICTION

After the decision of the immigration judge on April 7, 1987, petitioner filed an appeal to the Board of Immigration Appeals (BIA hereinafter) which affirmed the deportation order of the lower court. See, p. 1n, infra.

Petitioner, pursuant to 8 U.S.C. § 1105(a) subsequently appealed the BIA

decision to the Circuit Court of Appeals for the 11th Circuit. Petitioner also filed, pursuant to 28 U.S.C. § 2255 a motion to vacate his criminal conviction with the district court for the Northern District of Georgia. Petitioner appealed the denial of that Motion to the Circuit Court of Appeals for the 11th Circuit pursuant to 28 U.S.C. § 1291 where both appeals were consolidated. The 11th Circuit, on April 21, 1989, entered a judgment and opinion affirming the district court's denial of the § 2255 Motion and affirming the BIA's dismissal of the appeal. Petitioner filed a petition for rehearing and suggestion of rehearing en banc on May 11th, 1989, and the 11th Circuit denied those motions on June 1, 1989. The judgment was issued as a mandate on June 12, 1989.

The jurisdiction of this Court to review the judgment of the 11th Circuit is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2350.

STATEMENT OF THE CASE

Petitioner is a native of England and a citizen of New Zealand who entered the United States on October, 1980 as a visitor for pleasure. In 1982, petitioner adjusted his status to that of a lawful permanent resident based on his marriage to a United States citizen.

Mr. Duncan is actively involved in the United States film industry and has developed a highly regarded reputation in that field.

In 1984, Mr. Duncan was charged with violation of the United States Code resulting from an investigation of the activities of his then wife, a U.S. citizen. Mr. Duncan and his then wife were both charged and initially represented by the same counsel. Due to a conflict of interest and because Mr. Duncan strongly professed his innocence, he acquired different counsel. Mr. Duncan's counsel had some previous criminal law

experience but, as it turned out, had no experience nor knowledge of immigration matters. Mr. Duncan, throughout the plea negotiations, showed great concern for potential immigration consequences to any plea. He instructed his attorney to look into the matter and advise him of any possible adverse immigration consequences. Throughout, the petitioner maintained his innocence.

Criminal defense counsel contacted a couple of immigration lawyers telephonically, but could not verify that he conducted any independent research. Counsel then advised the petitioner that his plea would not cause him to be deportable. Petitioner pled guilty to violations of 28 U.S.C. § 843(b) and 18 U.S.C. § 2, and the district judge ordered a suspended sentence and placed Mr. Duncan on probation. Mr. Duncan subsequently completed probation. On August 14, 1986, the Immigration and Naturalization Service issued

an Order to Show Cause charging deportability under Section 241(a)(11) of the Immigration and Nationality Act (hereinafter "the Act") for a conviction of a law relating to narcotics based upon the subject guilty plea in 1985.

At the deportation hearing, the petitioner argued his innocence to any criminal wrongdoing, moved for a dismissal of the deportation charges on the basis that his conviction was not for a crime involving "laws relating to illicit traffic in cocaine" and, finally, the petitioner argued that he had been deprived of effective assistance of counsel in violation of Federal Rules of Criminal Procedure 11 and under the Sixth Amendment of the United States Constitution.

The immigration judge found the petitioner deportable on April 7, 1987. Thereafter, petitioner appealed to the Board of Immigration Appeals which appeal was dismissed.

On August 13, 1987, petitioner filed a Petition for Review with the 11th Circuit Court of Appeals to review the order of deportation on the three grounds previously raised.

Prior to that time, on July 31, 1987, petitioner filed a Motion to Vacate Plea under 28 U.S.C. § 2255 which motion was denied by the district court on March 7, 1988. During this period of time, the 11th Circuit stayed any further action.

Subsequently, petitioner appealed the District Court's denial of the Section 2255 motion to the 11th Circuit which remanded the matter to the district court for a full evidentiary hearing on January 3, 1989. The hearing was held and the district judge, on February 1, 1989, made findings of fact and entered conclusions of law. On April 21, 1989 the 11th Circuit issued a per curiam decision affirming the deportation order. At the same time, the 11th Circuit affirmed the

denial of petitioner's 28 U.S.C. § 2255 Motion to Vacate.

The 11th Circuit in its ruling found that "although his involvement may have been indirect and tangential, it was sufficient to authorize an INS inquiry and deportation order." However, the issue was not whether an INS inquiry and order were authorized, but whether the ground of deportation, as charged, was legally sufficient. That particular question was not directly answered. Furthermore, on the ineffective assistance of counsel argument, the 11th Circuit, without discussing any of the many relevant facts raised, found that "Duncan chose to plead guilty with the knowledge there was a possible risk of triggering a deportation inquiry." The 11th Circuit failed to evaluate the petitioner's claim, duly admitted to in the record, that his criminal defense counsel misguided and affirmatively misrepresented to the

petitioner that his plea to the subject criminal charge would not cause him to be deportable. In fact, upon entering that plea the petitioner became deportable and currently finds himself before this Court petitioning for a Writ of Certiorari to determine what the proper standard should be for review of an attorney's duties in respect to advising an alien client in criminal proceedings as to U.S. immigration consequences.

REASONS FOR GRANTING THE WRIT

I.

Affirmative misrepresentation by counsel on the immigration consequences of a criminal plea requires the invalidation of a plea based upon the Sixth Amendment constitutional right to effective assistance of counsel.

The 11th Circuit has dealt with the question of what duty counsel owes to his client and what duty the tribunal owes to a

defendant as to the consequences of a plea. In U.S. v. Downs-Morgan, 765 F.2d 1534 (11th Cir. 1985), the Court stated "courts have suggested that an affirmative misrepresentation by counsel that the accused would not be deported does constitute ineffective assistance of counsel and thus invalidates the resultant plea." Downs-Morgan, supra, 765 F.2d at 1640 (emphasis supplied). It has been argued in a number of federal cases that failure to advise of the immigration consequences of a plea violates Federal Rule of Criminal Procedure 11, but no court has yet extended Rule 11 in this fashion. See, e.g. Downs-Morgan v. United States, supra; United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982); Garcia-Trigo v. United States, 671 F.2d 147 (5th Cir. 1982); Fructman v. Canton, 532 F.2d 946 (9th Cir. 1976); Michel v. United States, 507 F.2d 461 (2nd Cir. 1974). Due to the frequency with which this issue has been raised in the

various federal jurisdictions, it has become a significant matter which merits a review of Federal Rule of Criminal Procedure 11 by the U.S. Supreme Court.

Under the Sixth Amendment to the United States Constitution, a defendant has a right to counsel. In order for that right to have any meaning, it must be a right to effective counsel. While no defendant could claim a right to have the premier trial lawyer in America try their case, each defendant must have the right to not be affirmatively misled by counsel. This Court, in McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1450, 25 L.Ed. 2d 775 found that the accused must "prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." Id. at 774.

Numerous states have deemed that proper immigration advice to an alien defendant is so important that they require by statute

that the defendant be advised of the immigration consequences of his plea. California, Massachusetts, Oregon, Connecticut, Washington and Texas have passed such legislation. Calif. Penal Code § 16.5 (1982); Or. Rev. Stat. § 135.385 (1982); Mass. Gen. Laws Ann. Ch. 278, § 29 D (West 1982); Con. Gen. Stat. Ann. § 54-1j (1982); Wash. Rev. Code § 10.40.200; Tex. Code Crim. P. Art. 26.13 (1985). Similar statutory schemes are under active consideration in other states as well.

In Illinois where there is not yet a state statute as discussed above, the Court of Appeals in a case involving a defendant who was incorrectly informed by his attorney that his guilty plea would not cause him to be deported, stated that:

> "Where defense counsel has unequivocally represented to his client that [a guilty] plea would not result in his deportation and that defendant has relied upon his patently erroneous advice in

> deciding to plead guilty, post-conviction relief is appropriate to permit the defense to plea anew." People v. Correa, 124 Ill. App. 3rd, 668, 80 Ill. Dec. 395, 465 Me. 2d 507, 512 (1984).

The argument of ineffective assistance counsel has been raised in various of the federal circuits. In the Second Circuit, it was raised recently in Janvier v. United States, 793 F.2d 449 (2d Cir. 1986) where the Court found that the attorney's failure to notify the defendant of the availability of a judicial recommendation against deportation pursuant to 8 U.S.C. § 1251(b) rose to the level of ineffective assistance of counsel and mandated the vacating of the plea. Id. at 449, 451 and 456.

In Gavilan v. U.S., 761 F.2d 226 (5th Cir. 1985), the 5th Circuit dealt with this issue but found factually that the defendant could not show prejudice. As far back as 1970 in the D.C. Circuit in United States v. Briscoe, 432 F.2d 1351 (D.C. Cir. 1970), the

Court held that "Under appropriate circumstances the fact that the defendant has been misled as to [the] consequence of deportability may render his guilty plea subject to attack." Id. at 1353.

The 11th Circuit in Downs-Morgan, supra, provides the most recent and intensive analysis of this issue. The troubling portion of that decision is the confusion as to what standard should be applied -- whether counsel's assistance was reasonable considering all the circumstances, or whether, even if such assistance was reasonable, did the affirmative misrepresentation so taint the subsequent plea to cause it to be invalid as it was based on incorrect advice. The court noted in Downs-Morgan, supra:

> "We decline to hold that an affirmative misrepresentation by an attorney in response to a specific inquiry by the accused which results in a plea of guilty necessarily constitutes ineffective assistance of counsel. 'In any case, in presenting an ineffective

> assistance claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances,' Washington, _____ U.S. at _____ 104 S.Ct. 2065, 80 L.Ed. 2d at 694."

Id. at 1541.

Significantly, in a footnote, the Court added:

> "We emphasize the narrowness of our decision. We do not hold that the District Court is under any obligation to inform the defendant about possible immigration consequences or that the Court's failure to do so affects the constitutionality of a guilty plea. Nor do we suggest that an affirmative misrepresentation by counsel in response to a specific inquiry about the possibility of deportation or exclusion, without the additional factors of imprisonment or execution is sufficient to warrant collateral relief."

In the instant case, the 11th Circuit remanded the case for an evidentiary hearing before the district court to determine whether there was ineffective assistance of counsel. While it is contended by the petitioner that the district court and the

11th Circuit misapplied the facts and interpreted the law inappropriately, it is petitioner's view that the legal issue raised is novel and important due to its repeated occurrence in the courts of this land. It is appropriate and, in fact, imperative that the Supreme Court decide the proper standards to be applied and to instruct counsel and the trial courts of America as to what obligation is owed to alien defendants in criminal proceedings as to potential immigration consequences, including, but not limited to, permanent banishment from the United States.

In the instant case, counsel provided clearly wrong advice to the defendant. Counsel advised the defendant that he would not be deportable based upon his plea. Counsel's efforts to research the matter were inadequate, and the resulting advice plainly wrong. The district court and the Circuit Court based their decision on counsel's loose advice that the petitioner would not be

deported "if he kept his nose clean." In fact, criminal defense counsel advised this petitioner that the crime to which he was about to enter a guilty plea was waivable, when, in fact, it was not. The plea caused the petitioner to become immediately deportable without any relief available. The petitioner continued to profess his innocence and, just as importantly, continued to inquire of his counsel, the government prosecutor and the district court whether this plea would cause him to become deportable from the United States. The petitioner received not only ineffective assistance of counsel, but defective representation.

II.

Determining whether a conviction under 21 U.S.C. § 843(b) or 18 U.S.C. § 2 constitutes a crime <u>related to</u> a controlled substance.

Due to the numerous alien criminal defendants charged in this country with varying degrees and types of "controlled substance" charges, it has become imperative for the trial and appellate courts of this land to look to the Supreme Court for elucidation of which crimes cause an alien defendant to become deportable. Section 241(a)(11) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1251(a)(11) (1987) provides for the deportation of any alien "who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation of...the United States...relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act 21 U.S.C. 802)." It appears clear that in order

for a conviction to constitute a deportable offense under Section 241(a)(11) of the Act, it must by its very terms relate to controlled substances; it is not enough that the facts surrounding the conviction involved controlled substances.

> "When facts underlying convictions involve narcotics, but the statute under which the alien is convicted is not a law relating to narcotics control, such conviction is not considered to be a deportable offense under 8 U.S.C. § 1251(a)(11)." D. Kesselbrenner and L. Rosenberg, Immigration Law and Crimes § 2.3 (1987)."

In Castaneda de Esper v. INS, 557 F.2d 79 (6th Cir. 1977), the key word was "related" and it is that definition which is not well settled and requires the attention and wisdom of this Court.

The only reported decision on this subject is that of the 9th Circuit in Chang-Salazar v. INS, 564 F.2d 302 (9th Cir. 1977). The immigration judge found that Mr. Chang-Salazar, a Peruvian citizen, who had been

convicted under 21 U.S.C. § 843(b) of using a telephone to facilitate a conspiracy to import cocaine from Peru in violation of 21 U.S.C. § 963 could not be considered to have been convicted of an offense relating to illicit traffic in narcotic drugs. However, the Board of Immigration Appeals reversed the judge and the 9th Circuit affirmed the BIA. The only other court that has ruled in this matter appears to be the 11th Circuit in the instant case.

The 11th Circuit touched upon the operative definition of "related" when it concluded that "...although his involvement may have been indirect and tangential, it was sufficient to authorize an INS inquiry and deportation order." The 11th Circuit went on to undercut petitioner's legal arguments by finding that Mr. Duncan, based on a DUI charge, actually caused his eventual downfall. Petitioner is not deportable upon the DUI offense, but rather has been ordered

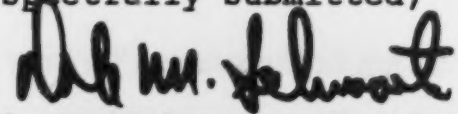
deported based on his plea to an offense which may not be related to a controlled substance.

18 U.S.C. § 2 relates to aiding and abetting in connection to any offense, and is not limited in any fashion to controlled substances. 21 U.S.C. § 843(b) does not, by its terms, specifically relate to controlled substances. The 11th Circuit was correct that the most than can be said of petitioner's involvement was that it was tangential and it would be important for this Court to speak to the issue of whether this particular crime is related to a controlled substance and to give a definition or a set of standards to apply to other crimes to determine whether they are "related" to offenses involving controlled substances.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.[1]

Respectfully submitted,



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[1] Petitioner raised three additional issues as to the validity of the plea entered in his criminal case. As the 11th Circuit omitted any comment on those three arguments, the petitioner is currently filing a successive Section 2255 motion to litigate those issues. Pending the results of that litigation, petitioner may seek to amend this Petiiton for Writ of Certiorari or to file a separate Petition.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8581

JONATHAN W. DUNCAN

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

No. 88-8221

D. C. Docket Nos. 87-1745, 84-349

JONATHAN W. DUNCAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court
for the Northern District of Georgia

(April 21, 1989)

Before TJOFLAT and CLARK, Circuit Judge, and ACKER*, District Judge.

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*Honorable William M. Acker, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

After the limited order of remand was entered by this court on January 3, 1989, the district court conducted an evidentiary hearing to explore the claim of defendant, Jonathan W. Duncan, that his guilty plea was not knowingly and involuntarily tendered and that his adjudication of guilt therefore constituted a violation of Rule 11, F.R.Cr.P., and of the Sixth Amendment. The district court received and considered all relevant evidence that was offered on his issue and made findings of fact and entered conclusions of law, now making it clear that Duncan chose to plead guilty with the knowledge there was a possible risk of triggering a deportation inquiry. The purpose of the remand having been served, the denial of defendant's petition invoking 28 U.S.C. § 2255 is AFFIRMED.

Duncan's separate appeal of his deportation order, a subject expressly not

addressed in this court opinion of January 3, 1989, must now be dealt with.

Appellant contends that the offense of which he was convicted was not "of a conspiracy to violate any law or regulation relating to the illicit traffic in cocaine," contrary to the assertion of the Immigration and Naturalization Service. By pleading guilty to a violation of 21 U.S.C. § 843(b), Duncan confirmed his unlawful use of a communication facility to facilitate the commission of the felony of conspiring to distribute cocaine; and although his involvement may have been indirect and tangential, it was sufficient to authorize an INS inquiry and deportation order. It is difficult to sympathize with Duncan's position after learning for the first time from the recent evidentiary hearing conducted by the district court that Duncan himself waved the red flag and that by committing a DUI offense waked up a sleeping INS. Duncan was apparently the author of his own

downfall. Under the circumstances, the deportation order complained of in No. 87-8581 is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
vs.	)	CRIMINAL
	)	ACTION
	)	NO. CR-84-349 A
	)	
JONATHAN W. DUNCAN	)	

O R D E R

Pursuant to Duncan v. Immigration and Naturalization Service, No. 87-8581 (11th Cir. Jan. 3, 1989), this court held an evidentiary hearing on January 19, 1989 and heard evidence relating to Duncan's motion under 28 U.S.C. § 2255 to set aside his adjudication of guilt on the ground that his guilty plea was not knowingly and voluntarily tendered. Duncan in his section 2255 claim primarily alleges that he was deprived of effective assistance of counsel in that his attorney misled him as to the immigration consequences of his bargained-for guilty plea. He argues that his unaccomplished

attorney advised him that a guilty plea to the lesser communications facility" offense would not expose him to deportation and only for that reason did he plead guilty when he had a good entrapment defense.

The court finds the following facts: Jonathan Duncan is a citizen of New Zealand but has been residing in the United States as a permanent resident alien. In the summer of 1984, Jonathan Duncan and his fiancee, Beth Ellen Chanin, (now his ex-wife), were charged in a two count indictment with conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and with distribution of cocaine in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2. Each of these charges carries a maximum penalty of 15 years incarceration. Both Duncan and Ms. Chanin, who was by this time his wife, were jointly represented at the arraignment and preliminary hearing by an experienced criminal attorney, Bruce Morris.

After arraignment and initial discussions with the United States Attorney's office, Mr. Morris advised Duncan that because of a potential conflict of interest between his wife and him in relation to the resolution of the case Duncan should retain independent counsel to represent him in plea negotiations. This case presented a situation where one defendant, Duncan, had arguably a meritorious entrapment defense and because of his lack of a prior record his sentence would likely involve probation as opposed to incarceration. On the other hand, Duncan's wife had no entrapment defense and if convicted Ms. Chanin, who was now pregnant with Mr. Duncan's child, would likely spend some time in jail as other unrelated drug charges were pending against her in the Superior Court of Gwinnett County, Georgia. The United States Attorney's office had informed Mr. Morris that they considered Duncan and Ms. Chanin a package deal. They

would not accept a plea from one unless the other pled as well.

Acting on Mr. Morris' advice, Duncan hired another attorney, T. Henry Clarke, to represent him in the plea negotiations. Mr. Clarke had some experience in criminal law but was primarily a real estate attorney. Clarke was a social acquaintance of Duncan's. Duncan had met Clarke through Ms. Chanin's former husband, Peter Chanin. Clarke was also a friend of Ms. Chanin's father. It was Clarke's and Duncan's understanding that Bruce Morris was to direct the plea negotiations and Clarke was brought in primarily to avoid any appearance of impropriety. Accordingly, Clarke's fee was greatly reduced and, in fact, he basically considered Duncan's case as pro bono work taken on as a favor to Duncan's father-in-law.

According to both Duncan and Clarke, Duncan had two main priorities which had to be addressed in the plea negotiations. First,

Duncan did not want his pregnant wife to serve any jail time and second, Duncan, a New Zealand citizen, would not plead guilty if it would have any adverse immigration consequences. With these objectives in mind, Morris and Clarke worked out an agreement with the Assistant United States Attorney (AUSA) whereby both Duncan and his wife would plead guilty to a lesser charge, serve their sentence on probation and the AUSA would have no objection to the lesser charge being one that had no adverse immigration consequences.

It was, however, up to Duncan and his counsel to determine whether the suggested lesser charge of using a communications facility in furtherance of the commission of a felony involving cocaine would result in deportation. At no time did the AUSA represent or guarantee to Duncan that a plea to the communications felony would not result in deportation. The AUSA made it clear that she was not certain what the immigration

consequences would be and if concerned Duncan's counsel should investigate.

At Duncan's request, Clarke investigated whether the communications charge would impact his immigration status. Clarke spoke with two experienced immigration attorneys, one of whom was suggested by Morris, and Clarke reviewed the statutory authority and case law which the immigration attorneys suggested would control Duncan's situation. Clarke's file on this case was destroyed by the attorneys who purchased his practice a few years ago and he does not recall from memory what specific statutes and cases he relied upon in making his determination.

From his research and his conversations with experienced immigration attorneys, Clarke determined that a plea to the communications felony would probably not have any immigration consequences so long as Duncan avoided any more trouble with the law. It was Clarke's opinion that the communications felony was a "minor felony"

and the fact that Duncan was married to a United States citizen and was going to be the father of a United States citizen weighed in his favor if any immigration problem arose due to the plea. Clarke did, however, make it clear to Duncan, while he would probably be alright with the communications plea, Immigration and Naturalization Services ("INS") was unpredictable and there was no guarantee that they would not try to deport him.

Duncan testified at the evidentiary hearing that Clarke advised him he would not have any problem with the INS so long as "he kept his nose clean." Based on this opinion and the fact that the charge had been reduced from two counts which could possibly result in 30 years incarceration to a charge which would allow both Duncan and his wife to only serve 4 years on probation, Jonathan Duncan pled guilty to the charge of using a communications facility to further commission of a felony involving cocaine.

Duncan did not initially have any problems with the INS as a result of his plea. However, one year after his plea, because he had been charged with Driving Under the Influence by State authorities and was brought before this court for probation revocation, his case came to the attention of the INS. The INS instituted a deportation action against him and Duncan discovered that his guilty plea to the communications facility felony because it was considered a drug related crime made him automatically deportable under INS provisions. see 8 U.S.C. § 1251. Because the charge fell under the automatic deportation provision, Duncan was not eligible for any waiver that may have been available to him as a result of marriage to a United States citizen.

Duncan now contends that, because Mr. Clarke did not warn him about this possible consequence, his plea was not voluntary as he would never have pled guilty if he had known it would lead to automatic deportation. On

the contrary, the court finds that Mr. Clarke did, indeed, advise Duncan of the potential for deportation as a result of his plea. In fact, Duncan's situation followed the exact pattern that Clarke warned Duncan would subject him to deportation. At the evidentiary hearing held by this court, Duncan testified that Clarke had told him his plea would not result in deportation so long as he "kept his nose clean" during the probationary period. As the evidence showed, the basic plea was not the triggering factor in Duncan's deportation. Duncan failed to follow the rules of his probation, got in trouble with the authorities and as a result his case was brought before the INS. The facts of this case prove that Mr. Clarke's opinion about the deportation consequences of Duncan's plea was accurate.

Duncan makes much of the fact that Clarke mistakenly advised Duncan that a waiver would be available to him even if the INS instituted deportation proceedings as a

result of his plea. Clarke testified that he felt because of Duncan's marriage to a United States citizen and his impending fatherhood he would eligible for a waiver. In this opinion, however, Clarke was wrong. The automatic deportation provision for drug related offenses does not allow for waiver. The court finds this error in Clarke's advice to be irrelevant. Although Clarke's advice mischaracterized the availability of a waiver, Clarke's advice accurately presented the possible immigration consequences of Duncan's plea.

Clarke's opinion that Duncan would be entitled to a waiver was based on his marriage to Ms. Chanin and her pregnancy. If, at the time a deportation question arose, Duncan was not married to a United States citizen or the father of a United States citizen, then the waiver provisions would be inapplicable to his case. So while Duncan was misadvised that waiver was available, he was also aware that waiver was not guaranteed.

Waiver would be based on his marital and parental status at the time of deportation not at the time of the plea. The facts of this case show that even if Clarke had been right about the availability of waiver when Duncan pled, it would not have help his case when the INS began deportation proceedings as he and Ms. Chanin had divorced and Ms. Chanin had suffered a miscarriage of the child she was expecting at the time of his plea.

No one, including Mr. Clarke, promised Duncan he would not be deported. Indeed, Duncan answered in the negative when this court inquired at the Rule 11 hearing whether "anyone has promised you any thing else other than what is in the negotiated plea in this case?" As well, Duncan responded in the negative when asked if he had any understandings or agreements with anyone concerning this case or its outcome. The evidence shows that Duncan was aware that the possibility of deportation as a consequence of his plea existed. While the degree of the

risk had been miscalculated, Duncan was aware that there was no foolproof guarantee that pleading guilty would not subject him to deportation. He knowingly chose to run the risk of deportation when he pled guilty to the lesser offense in order to keep his pregnant wife from having to serve time in jail.

Duncan also tries to show ineffective assistance of counsel by arguing that Clarke was not a criminal attorney nor did he have any background in immigration law. The standard for ineffective assistance of counsel is whether trial counsel's conduct was unreasonable and that, but for the failure, the result of the plea proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). Duncan chose his own counsel in this case. He was aware that Clarke was primarily a real estate attorney. Duncan testified at the evidentiary hearing he only hired Clarke to avoid the appearance of impropriety and that everyone

understood that he was primarily relying on the advice and experience of Bruce Morris in the defense of his case. Additionally, when Duncan asked Clarke to investigate the immigration consequences of his plea he knew Clarke was not an immigration attorney and would have to rely on the input and advice of more experienced attorneys. The court finds that Clarke's conduct--consulting two experienced immigration attorney's and conducting independent research on the issue--was not unreasonable in this case.

Furthermore, the court finds that Clarke's ultimate opinion about the immigration consequences of a plea to the communications charge was not unreasonable. The evidence presented at the hearing shows that the experienced immigration attorneys who were consulted shared Clarke's opinion that given Duncan's background and his marriage he would not be deported as a result of the plea so long 'as he stayed out of trouble. The court also notes that Duncan

testified that Mr. Morris upon whom he was relying as primary counsel agreed with Clarke's conclusion that he would have no problem as a result of the plea so long as he stayed out of trouble and that given the dual goals of keeping his wife out of jail and avoiding deportation, the communications charge was the best possible deal that could be worked out for both Duncan and his wife. While he ran the risk of deportation if he failed to stay clean, Duncan, his wife, and their unborn child avoided the risk of a guilty verdict and up to 15 years incarceration on each of the two counts of the indictment.

In order to show that Clarke acted unreasonably, Duncan points the court to the case of Chang-Salazar v. Immigration & Naturalization Service, 564 F.2d 302 (1977) wherein the Ninth Circuit held that the crime of using a communications facility to facilitate the commission of a felony involving cocaine fell into the category of

automatically deportable crimes. Clarke testified that he did not recall seeing this case and Duncan argues that if Clarke had found the case he would have known his opinion was wrong, would have changed his advice and Duncan would not have pied guilty. Chang-Salazar shows that at the time of Duncan's plea one circuit had specifically reached the question presented by Duncan's case but it does not suggest that the issue was a settled matter of law in the Eleventh Circuit where Duncan was being charged. The existence of one opinion which differs from the conclusion reached by all the attorney's consulted in Duncan's case does not render Clarke's conduct unreasonable; especially in light of the fact that the case has no precendential value in the Eleventh Circuit where Duncan was charged.

This court concludes that Duncan was not misled about the immigration consequences of his plea by Clarke and that Clarke's conduct in researching the immigration consequences

of Duncan's plea and his opinion based on that research was not unreasonable and did not constitute ineffective assistance of counsel so as to render Duncan's plea involuntary in violation of F.R.Cr.P 11 and the Sixth Amendment of the Constitution of the United States. Accordingly, Duncan's motion to set aside his guilty plea on the basis that it was involuntarily entered into is DENIED.

SO ORDERED, this 1st day of February, 1989.

ROBERT L. VINING, JR.
United States District Judge

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A23 527 532 - Atlanta Date: Jun. 10, 1987

In Re: JONATHAN A. DUNCAN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Steven R. Riemer
General Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] - Convicted of narcotics violation

APPLICATION: Termination

ORDER:

PER CURIAM. The April 7, 1987, decision of the immigration judge is affirmed. The file has been forwarded to the Board without a transcript. Upon review of the record, we find that a transcript is not necessary for adjudication of these proceedings. See

Matter of Torre, Interim Decision 2954 (BIA 1984).

The respondent admits that he was convicted of a violation of 21 U.S.C. §843(b) - the unlawful use of a communication facility to facilitate commission of the felony of conspiracy to distribute cocaine. In Matter of Chang, 16 I&N Dec. 90 (BIA), aff'd sub nom. Chang-Salazar v. INS, 564 F.2d 302 (9th Cir. 1977), we held that a conviction under 21 U.S.C. § 843(b), for unlawfully using a communications facility to facilitate the commission of the felony of conspiracy to import cocaine, was a conviction of a crime relating to the illicit traffic in narcotic drugs described in section 212(a)(23) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(23). As pertinent, section 241(a)(11) of the Act provides for the deportation of an alien who at any time after entry has been convicted of a violation of, or a conspiracy to violate,

any law or regulation relating to the illicit traffic in narcotic drugs. Thus, a conviction under 21 U.S.C. §843(b) for unlawfully using a communication facility to facilitate commission of the felony of conspiracy to distribute cocaine is a conviction of a crime relating to the illicit traffic in narcotic drugs described in section 241(a)(11) of the Act.

The respondent's assertion that his conviction [1] was obtained in violation of his constitutional rights is addressed to the wrong forum. Immigration authorities must look to the judicial record and may not go beyond it to determine guilt or innocence. Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir.), cert. denied, 434 U.S. 853 (1977); Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); see Zinnanti v. INS, 651 F.2d 420

The respondent was convicted on July 30, 1985, in th
.ted States District Court for the Northern District o
›rgia, on his plea of guilty.

(5th Cir. 1981); Ocon-Perez v. INS, 550 F.2d 1153 (9th Cir. 1977); Matter of Knalik, 17 I&N Dec. 518 (BIA 1980).

The respondent's deportability has been established by clear, unequivocal, and convincing evidence. See Wodby v. INS, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a).

Accordingly, the appeal is dismissed.

Acting Chairman

BEST AVAILABLE COPY

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

Richard B. Russell Federal Building
75 Spring Street, S.W. Room 1354
Atlanta, Georgia 30303

In the Matter of	)	
	)	
Jonathan W. Duncan	)	IN DEPORTATION
	)	PROCEEDINGS
A 23 527 532	)	
Respondent	)	

The respondent is a native of England and a citizen of New Zealand who last entered the United states at Honolulu as a visitor. On February 25, 1982, his status was adjusted to lawful permanent resident. On July 20, 1985, he was convicted of using a communication facility in furtherance of a conspiracy to distribute cocaine in violation of 21 U.S.C. sections 846 and 843(b). These facts are based upon admissions made by the respondent at his deportation hearing. In Matter of Chang, 16 I&N 90 (BIA 1977), the Board found such a conviction to establish excludability under section 212(a)(23) of the

Act. Sections 212(a)(23) and 241(a)(11) are virtually identical and I find deportability under section 241(a)(11) had been established. Further, I find that the respondent is not eligible for any relief from deportation. Respondent has chosen New Zealand as the country of deportation.

ORDER: IT IS HEREBY ORDERED that the respondent be deported from the United States to New Zealand.

April 7, 1987

Charles E. Auslander, Jr.
Immigration Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-8581

JONATHAN W. DUNCAN Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

NO. 88-8221

JONATHAN DUNCAN, Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion April 21, ___, 11 Cir., 1989, __F.2d___).

Before TJOFLAT and CLARK, Circuit Judges, and ACKER*, District Judge.

PER CURIAM:

(x) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having

requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5, the Suggestions of Rehearing In Bank are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active Service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 87-8581

JONATHAN W. DUNCAN,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

No. 8221

D.C. Docket Nos. 87-1745, 84-349

JONATHAN W. DUNCAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court

for the Northern District of Georgia

Before TJOFLAT and CLARK, Circuit Judges, and ACKER*, District Judge.

J U D G M E N T

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of the said District Court in these causes be and the same are hereby AFFIRMED;

IT IS FURTHER ORDERED THAT petitioner pay to respondent, the costs on appeal in Case No. 87-8581 to be taxed by the Clerk of this Court.

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*Honorable William M. Acker, Jr., U.S. District Court for the Northern District of Alabama, sitting by designation.

Entered: April 21, 1989

For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUE AS MANDATE: JUNE 12, 1989

CERTIFICATE OF SERVICE

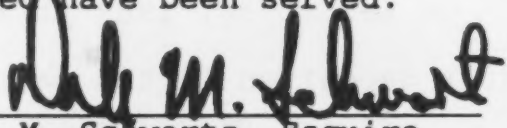
I, Dale M. Schwartz, a member of the Bar of this Court, hereby certify that on this 30th day of August, 1989, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class, postage prepaid, to:

Solicitor General,
Department of Justice
Washington, D.C. 20530

Robert L. Barr, Jr.,
United States Attorney
Mary Jane Stewart,
Assistant United States Atty.
1800 United States Courthouse,
75 Spring Street,
Atlanta, Georgia 30335

Joseph F. Ciolino, Attorney
Office of Immigration
Litigation
Civil Division
Department of Justice
P.O. Box 878,
Ben Franklin Station
Washington, D.C. 20044

I further certify that all parties required to be served have been served.



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(404) 658-8097
Counsel of Record

SUPREME COURT OF THE UNITED STATES

No._____

JONATHAN W. DUNCAN

(Petitioner)
vs. IMMIGRATION AND NATURALIZATION SERVICE AND THE UNITED STATES OF AMERICA
(Respondents).

The Clerk will enter my appearance as Counsel of Record for Jonathan W. Duncan who, IN THIS COURT, is Petitioner.

I certify that I am a member of the Bar of the Supreme Court of the United States.

Signature: Dale M. Schwartz

(Type or Print Name) Dale M. Schwartz

Mr.

Firm: Troutman, Sanders, Lockerman & Ashmore

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